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No. 144.

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JAMES H. McKENNEY
Clerk

Brf. of Kretzinger for Appellees.

Filed Feb. 14th, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant*,
vs.
D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

MOTION OF APPELLEES TO AFFIRM JUDGMENT FOR WANT OF A STATEMENT OF FACTS IN THE NATURE OF A SPECIAL VERDICT.

G. W. KRETZINGER,
SOLICITOR FOR APPELLEES.

BARNARD & MILLER PRINT, CHICAGO.

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B. F. THOMPSON, *Appellant,* *vs.* D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*	Appeal from the Supreme Court of the Territory of Arizona.

Motion of Appellees to Affirm Judgment for want of a Statement of Facts in the nature of a Special Verdict.

Come now the appellees, D. M. Ferry, Simon J. Murphy and Charles C. Bowen, by G. W. Kretzinger, their solicitor, and respectfully move this honorable court to enter a judgment of affirmance herein, because:

1. The Supreme Court of Arizona did not make or certify a statement of facts in the nature of a special verdict herein.

2. There is no error assigned on the rejection or admission of evidence.

G. W. KRETZINGER,
Solicitor for Appellees.

MAY IT PLEASE THIS HONORABLE COURT:

In support of the foregoing motion, we direct the attention of the court to the so-called statement of facts appearing on pages 130 and 131 of the transcript. It is not in compliance with the act of April 7, 1874, C. 80, S. 2, 18 Stat., 27, 28.

The Supreme Court of the Territory "takes the facts as certified * * * in the original papers in said cause, to wit: the judgment roll, * * * the minute entries in said cause, * * * together with *the findings of fact in the court below*, the motion for a new trial, and *the reporter's transcript of the evidence taken on the trial of said cause*, all certified to by said clerk of said District Court as being the whole of the record of said cause."

The District Court made no statement of facts in the case. It filed a written opinion, appearing on pages 104 to 112 of the transcript; but narration of facts in an opinion is not "a statement of facts in the nature of a special verdict" required by the statute.

Saltonstall v. *Burtwell*, 150 U. S., 417.

Nor is the record aided by the fact that the territorial Supreme Court incorporates in its certified statement of the case, so-called, all the evidence introduced by the parties. The statute requires not a mere report of the evidence, but a statement of the ultimate facts which such evidence establishes.

Norris v. *Jackson*, 9 Wall., 125.
Lehren v. *Dickson*, 148 U. S., 71.

The juisdiction of this court on an appeal from the Supreme Court of the Territory is derived from and limited by the statute. Under the statute the court has no power to examine the evidence to ascertain what the facts were, and in the absence of a certified statement of facts in the nature of a special verdict, there is nothing before the court from which it can judicially derive knowledge of the facts upon which the judgment proceeded. It must therefore assume that the evidence sustains the judgment.

Marshall v. *Burtis*, 172 U. S., 630.

Appellant having failed to comply with the statute in perfecting his appeal, the judgment should be affirmed.

Respectfully submitted.

G. W. KRETZINGER,
Solicitor for Appellees.